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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 PETER RUDOLPH, individually and on)
behalf of all others similarly situated,)

13)
14 Plaintiff,)

15 vs.)

16 UT STARCOM, HONG LIANG LU,)
MICHAEL SOPHIE, THOMAS TOY, and)
17 FRANCIS BARTON,)

18 Defendants.)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

Case No. 3:07-CV-04578-SI

**JAMES R. BARTHOLOMEW'S
OPPOSITION TO THE DETECTIVES'
ENDOWMENT ASSOCIATION
ANNUITY FUNDS' MOTION FOR
APPOINTMENT AS LEAD PLAINTIFF**

DATE: December 14, 2007

TIME: 9:00 a.m.

COURTROOM: 10

JUDGE: Hon. Susan Illston

Movant, James R. Bartholomew ("Mr. Bartholomew" or "Movant") respectfully submits this opposition to the competing motion for appointment of lead plaintiff filed by the Detectives Endowment Association Annuity Fund (the "Fund"). Specifically, Mr. Bartholomew asks that the Court deny the Fund's motion and instead approve his own motion. Mr. Bartholomew has a significantly larger loss than the Fund. Further, Mr. Bartholomew is a typical and adequate representative of the Class, while the Fund, with no viable claim, is not. Thus, Mr. Bartholomew's Motion for Appointment as Lead Plaintiff and For Approval of Lead Plaintiff's Selection of Counsel should be granted and the Fund's motion should be denied.

INTRODUCTION

Presently pending in the above-captioned case are two motions for appointment as Lead Plaintiff and for approval of selection of Lead Counsel. One individual, Mr. Bartholomew, has moved, as well as one institutional investor, the Fund, for appointment as lead plaintiff. The current movants and their respective losses are as follows:

PROPOSED LEAD PLAINTIFF	LOSSES	PROPOSED LEAD COUNSEL	NUMBER OF SHARES STILL OWNED BY MOVANT
James R. Bartholomew	\$2,106,513.00	Finkelstein Thompson LLP	300,000
Detectives' Endowment Assoc. Annuity Fund	\$154,752.30	Schoengold Sporn Laitman & Lometti, P.C.	0

I. THE FUND'S FINANCIAL INTEREST IN THIS LITIGATION IS DWARFED BY MR. BARTHOLOMEW'S

The PSLRA directs courts to appoint as lead plaintiff "the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(I). The court must consider three factors in appointing a lead plaintiff: (1) whether the movant has either filed the complaint or made a motion in response to a notice; (2) whether the movant has the largest financial interests in

1 the relief sought by the class; and (3) whether the movant otherwise satisfies the requirements of
 2 Rule 23 of the Federal Rules of Civil Procedure. *See id.* at § 78u-4(3)B)(iii)(I); *see also In re*
 3 *Cavanaugh*, 306 F.3d 726, 729-730 (9th Cir. 2002). Simply stated, the court must determine who
 4 “has the most to gain from the lawsuit.” *Cavanaugh*, 306 F.3d at 730.

5 Based on the calculations accompanying their respective lead plaintiff motions, Mr.
 6 Bartholomew has a significantly larger loss than the Fund. Mr. Bartholomew’s calculated loss
 7 amounts to \$2,106,513, while the Fund’s amounts to \$154,752.30. Thus, Mr. Bartholomew’s loss
 8 surpasses that of the Fund by \$1,951,760.70. However, as discussed below, Mr. Bartholomew
 9 contends that the Fund has no financial interest in this litigation, as it liquidated its shares prior to
 10 any corrective disclosure.

11 The Ninth Circuit does not have a uniform or mandatory rule for calculating financial
 12 interest. *See Cavanaugh*, 306 F.3d at 730 n.4 (stating that the court did “not decide the scope of
 13 the district court’s discretion in determining which plaintiff has the greatest financial interest in the
 14 litigation”). The Northern District of California has adopted a four-factor test to identify the
 15 plaintiff with the largest financial interest. The four factors to be considered are: “(1) the number
 16 of shares purchased during the class period; (2) the number of net shares purchased during the
 17 class period; (3) the total net funds expended during the class period; and (4) the approximate
 18 losses suffered.” *Casden v. HPL Techs. Inc.*, 2003 U.S. Dist. LEXIS 19606, at *12 (N.D. Cal.
 19 Sept. 29, 2003); *see also In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 440 (S.D. Tex. 2002); *In*
 20 *re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295 (E.D.N.Y. 1998).

21 Applying the four-factor test here, Mr. Bartholomew unquestionably prevails on all
 22 factors: (1) Mr. Bartholomew purchased 300,000 shares, while the Fund purchased only 16,600;
 23 (2) Mr. Bartholomew was a net purchaser of 300,000 UTStarcom shares during the Class Period,
 24 as he did not make any sales during this time frame, while the Fund’s net share purchase during
 25 the Class Period totals zero, as it sold all of its shares in 2005; (3) Mr. Bartholomew expended
 26 \$3,052,389.00 while the Fund expended \$358,357.82; and (4) Mr. Bartholomew’s approximate
 27

1 loss is \$2,106,513.00, while the Funds approximates its loss as \$154,752.30 – however it does not
2 appear that any of the Fund’s loss was attributable to UTStarcom’s options backdating.

3 Thus, Mr. Bartholomew has a significantly larger financial interest in this litigation than
4 the Fund and prevails over the Fund on every prong of the *Casden* four factor test. As such, Mr.
5 Bartholomew is the presumptive most adequate lead plaintiff, and the Fund’s motion should be
6 denied.

7 **II. THE FUND CANNOT SATISFY THE REQUIREMENTS OF RULE 23**

8 In the Ninth Circuit, once a court “determines which plaintiff has the biggest stake, the
9 [district] court must appoint that plaintiff as lead, unless it finds that he does not satisfy the
10 typicality or adequacy requirements.” *Cavanaugh*, 306 F.3d at 732. Unlike the Fund, Mr.
11 Bartholomew’s claim is typical as it arises from the same conduct giving rise to the claims of the
12 class. *See In re Lucent Techs., Inc. Sec. Litig.*, 194 F.R.D. 137, 150 (D.N.J. 2000). Mr.
13 Bartholomew also satisfies the adequacy requirement. He has sufficient interest in the case’s
14 outcome to ensure vigorous advocacy for the class. Further his interests are not antagonistic to
15 those of the absent class members in any manner.

16 The Fund is neither a typical nor an adequate representative of the Class. Under the
17 principles articulated by the Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo*, the Fund
18 simply cannot properly allege a claim for securities fraud in connection with UTStarcom’s options
19 backdating. 544 U.S 336 (2005). In *Dura*, the Supreme Court held impermissible the Ninth
20 Circuit’s inflation-only approach to loss causation, since “as a matter of pure logic, at the moment
21 the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is
22 offset by ownership of a share that *at that instant* possess equivalent value.” *Id.* at 338-46
23 (emphasis in original).

24 Under *Dura*, purchasers who sell their shares and liquidate their position entirely prior to
25 the dissemination of corrective disclosures cannot satisfy the element of loss causation, in that
26 they cannot allege any diminishment in the value of their securities that was caused by the
27 revelation of the fraud. *See id.* Here, the Fund sold all of its UTStarcom shares in two

1 transactions on March 8, 2005 and April 4, 2005. These sales took place months before *any*
 2 corrective disclosures relating to the options backdating allegations at issue in this matter.¹
 3 Thus, the Fund does not have a viable claim as it did not hold any of its shares through a
 4 corrective disclosure. As such, the Fund cannot satisfy the adequacy or typicality requirements
 5 of Rule 23, and its motion cannot be granted. *See Cornerstone Propane Partners, L.P. Sec.*
 6 *Litig.*, No. C-03-2522, 2006 WL 1180267 (N.D. Cal. May 3, 2006)(holding that shareholders
 7 who sold their stock prior to the first corrective disclosure did not suffer any loss and could not
 8 be part of the class); *see also Kops v. NVE Corp.*, No. Civ. 06-574 et al., 2006 WL 2035508
 9 (D. Minn. July 19, 2006) (finding that a plaintiff who had sold all of his shares prior to the
 10 corrective disclosure had not suffered any loss as a result of defendants' actions).

11 CONCLUSION

12 Mr. Bartholomew is clearly the most adequate movant to fulfill the lead plaintiff role in
 13 this litigation. He filed a timely motion for appointment. His financial interest in the litigation
 14 far outweighs that of the Fund's. And, he is a typical and adequate representative for the class
 15 under Rule 23, unlike the Fund who do not possess a viable claim under *Dura*. Thus, this Court
 16 should deny the Fund's motion and grant Mr. Bartholomew's Motion for Appointment as Lead
 17 Plaintiff and for Approval of Lead Plaintiff's Selection of Counsel, filed with this Court on
 18 November 5, 2007.

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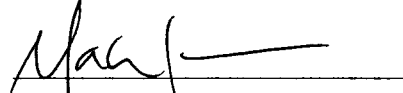
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 27 ¹ The *Rudolph* complaint alleges three corrective disclosure dates: (1) November 7, 2006;
 28 (2) February 1, 2007; and (3) July 24, 2007. The Fund did not own any UTStarcom shares on
 any of these dates.

1 Dated: November 21, 2007

Respectfully submitted,

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